No. 2620.

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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE SAN FRANCISCO BREWERIES, Ltd., a corporation,
Plaintiff in Error,
vs.
SYLVIA A. BRAINARD,
Defendant in Error.

SUPPLEMENT TO BRIEF FOR DEFENDANT IN ERROR

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Our attention has been called to the fact that neither of the briefs heretofore filed in the above-entitled case contains any statement of facts as required by subdivision 2 of Rule 24 of this Court. For the purpose of supplying this defect we submit the following statement of facts:

This is an action to recover damages for personal injuries sustained by the defendant in error on May 29, 1914, by being knocked down and trampled upon at the corner of Twentieth Street and Broadway in the City of Oakland by two horses which were running away, drawing after them a brewery wagon owned by the plaintiff in error. The answer denies

that said injuries were caused by any negligence on the part of the plaintiff in error or on the part of any of its employees.

The plaintiff in error is a corporation owning a number of breweries, one of which, known as the John Wieland Brewery, has a place of business on the west side of Broadway between Nineteenth and Twentieth Streets in the City of Oakland. (Transcript, pp. 70, 65.) Exhibit A is a diagram of said premises, (Transcript, pp. 62-3,) and Exhibits 1, 2, and 3, are photographs showing the appearance of said premises viewed from Broadway. (Transcript, p. 35.) Said premises have two entrances from Broadway, each about 10 feet wide. At the rear is a barn or stable. Inside the property line a driveway extends from each of the entrances to the barn or stable so that a wagon can go in by one entrance and out by the other. Along that part of the driveway extending from the northernmost of the two entrances back to the barn or stable there is on the right hand side as one enters from Broadway a building used for various purposes, the front portion being an office and the rear portion a bottling-house. From the bottling-house two doors open on the driveway, each having in front of it a loading platform. From the office one door opens on the driveway and one on Broadway. The office also has a window opening on the driveway. (Transcript, pp. 62-3.)

The horses which knocked down the defendant in error were owned by one Charles Thun, from whom the plaintiff in error had hired them for the day.

(Transcript, pp. 34, 65.) Thun took them to the brewery shortly after 7 o'clock in the morning and left them there in charge of employees of the plaintiff in error. (Transcript, pp. 34, 41, 71, 79, 91.) They were used during the day in drawing a wagon owned by the plaintiff in error. (Transcript, pp. 25, 91-2, 97.) In the course of the afternoon Thun was notified by telephone that the horses would not be wanted for the following day, and was told to call for them at half past five o'clock. (Transcript, pp. 34, 66.) Accordingly, at about half past five o'clock, or shortly before, he went to the brewery to fetch them. (Transcript, pp. 34, 72, 80.)

When he arrived at the brewery the horses were standing in the northernmost of the two driveways about 20 or 30 feet back from the street entrance and facing toward it. The door was open. The horses were still hitched to the wagon. (Transcript, pp. 34-5.) They had been brought back to the brewery shortly after 4 o'clock by Harry Crow, the man who drove them during the day, (Transcript, p. 92) and had remained standing where they were when Thun arrived ever since Crow had brought them back to the brewery after completing his route. (Transcript, pp. 79-80, 92.)

Postponing for the time being any attempt to state the facts with regard to which there is any room for discussion, the undisputed circumstances immediately preceding the knocking down of the defendant in error at the corner of Twentieth Street and Broadway were that at about 5:30 p. m. or shortly thereafter the

horses emerged from the northernmost entrance of said premises of the plaintiff in error, running away without any driver, and drawing after them the wagon to which since morning they had been hitched, and that on reaching the pavement of Broadway they turned toward Twentieth Street, and continued running until they dashed against a building at the northwest corner of those two streets, overtaking the defendant in error while she was attempting to find a place of safety. (Transcript, pp. 39, 46-8, 59-60, 66-7, 69, 72-4.)

The main controversy in the case is as to what happened during the brief interval between Thun's arrival at the brewery and the time when the horses escaped from the premises, running away without a driver. There is also a question as to just what conversation took place between Thun and the manager of the plaintiff in error at the time when the horses were hired on May 28th, and also as to what conversation took place between Thun and certain employees of the plaintiff in error on May 29th at the time when the horses were left at the brewery in the morning.

Thun testified that when he was asked to rent the team he informed the person with whom he talked on that occasion that it was "a lively team." (Transcript, p. 42.) He also testified that when he delivered the team at the brewery on May 29th in the morning he informed the three men whom he found there at work that the team had done nothing for a couple of days and ought to be handled carefully. (Transcript, pp. 34, 42-3.) It was admitted by the several employees

of plaintiff in error that at the time when the horses were brought to the brewery in the morning one of them had a halter on under his bridle, and that there was some conversation about the character of the horses, and as to the advisability of being more than usually careful in driving them. (Transcript, pp. 73, 76, 79, 86, 96-7.) Crow also admitted that while driving the team during the day he had observed one of the horses to be a good free horse, right on the bit all the time, "would have gone if you had let him go," and he was unwilling to deny that he had stated in explanation of the accident shortly after it occurred that one of the horses was a bad horse and had tried several times during the day to run away. (Transcript, pp. 97-8.)

Upon arriving at the brewery Thun entered by the southern doorway and walked all the way to the rear of the premises, where a horse with a lame foot was occupying the attention of three employees of the plaintiff in error, two of whom, Cooper and McKinnon, were engaged in "doctoring" it, while Crow was looking on. (Transcript, pp. 72, 79-80, 106.) As Thun approached the group, Cooper said to him, "There's your team, it is ready for you," or made some equivalent remark. (Transcript, pp. 43, 93.) Thun did not immediately do anything toward taking his horses away. He first stood for a couple of minutes, watching the operation on the lame horse, (Transcript, pp. 44, 80) and then for another few minutes, perhaps six or seven minutes, sat on the platform before the rear door of the bottling-house, engaged in conversation with Crow. (Transcript, pp. 80, 93.)

While Crow and Thun were conversing, McKinnon went to the office at the front of the premises (Transcript, p. 72,) leaving Cooper alone with the lame horse. (Transcript, p. 80.) After an interval Thun remarked to Crow, "I guess I'll have to unhitch and go home." (Transcript, pp. 44, 80, 93.) To which Crow made a reply, the words of which are reported differently by the witnesses. Cooper says that Crow said, "Well to show you I am a good fellow, I'll help you unhitch." (Transcript, p. 80.) Crow says that he said, "All right, I have been driving them all day, and I will come and help you unhitch them." (Transcript, pp. 93-4.) Thun says that what Crow said was: "I'll unhitch them for you." (Transcript, pp. 44-5.)

Thereupon Crow and Thun walked toward the team, Thun slightly in the lead. (Transcript, pp. 80, 94.) The place where the horses were standing was near the door leading from the driveway into the office, the hind wheels of the wagon being opposite to the door. (Transcript, pp. 45, 88-90, 92-3.) As a preliminary to doing anything about taking the horses home, Thun started to go to the office for the purpose of collecting the money due him for their hire. (Transcript, p. 36.) In order to reach the door leading to the office he passed behind the wagon and to the left of it, (Transcript, pp. 37, 45, 94,) Crow proceeding at the same time on the right hand side of the wagon toward the horses. (Transcript, pp. 36, 37.)

Just as Thun reached the threshold of the door leading to the office something induced him to turn

around, and he then saw that the team had already started to run toward the street. He did not see the team start to run, and did not see where Crow was, or what he was doing, when the team started. When Thun first "got a good look" the wagon was disappearing through the street entrance and Crow was lying on the sidewalk just outside, as though he either had fallen or had been knocked over. Thun ran after the team but could not run as fast as they did. (Transcript, pp. 37-9, 46.)

At the time when the motion for a nonsuit was made no evidence had been introduced tending in any way to show that any attempt had been made by Crow to see that the team was properly fastened or was fastened at all while standing in the driveway facing the open doorway leading out to Broadway. On the contrary the testimony of Thun was that when he saw the wagon going out through the doorway, and afterwards when he saw it proceeding along Broadway toward Twentieth street, the hind wheels were turning around. (Transcript, pp. 40-41.) He was unable to testify as to whether the reins were or had been fastened in any manner, but it was in evidence that the horses were going at a full gallop after they left the premises of the plaintiff in error. (Transcript, pp. 39, 59.)

On the part of the plaintiff in error testimony was introduced to the effect that the brake had been set; (Transcript, pp. 67, 80, 83, 87-8, 90, 93;) but McKinnon, the only witness who had been quite close to the wheels of the wagon after the horses had reached the street, and while they were running away, was un-

able to say whether the wheels at that time were dragging or not. (Transcript, p. 74.)

As to what Crow was doing at the time when the horses started to run, there was practically no evidence other than his own testimony and such inferences as the jury might justifiably draw both from that testimony and from what it left untold. Thun was on the other side of the wagon and could not see Crow. McKinnon was inside the office talking with the manager. (Transcript, p. 72.) Cooper was engaged with the lame horse at the rear of the premises. (Transcript, p. 80.) He testified as follows:

> "When I first noticed the team in motion, Mr. Crow was just stepping up, grabbing, reaching for the lines, stepping on to the step of the wagon; it was all done so quick I do not know whether his feet were touching the step or not, but he did have it afterwards, because he got the line and I seen him dragged on to the sidewalk. When he went out on the sidewalk he was on his back dragging." (Transcript, p. 82.)

The explanation which Crow gave was as follows (Transcript, p. 94):

> "He (Thun) went on the left-hand side of the wagon and I went on the right-hand side. * * * All at once the horses started to go and I made a jump on the step and grabbed for the lines, and I caught one line, and they dragged me through the doorway. * * * Just as I got to the step there was something started them. Then I made a grab for the lines and jumped on the step to get hold of the line; the brake was still on and the lines were still fast. I got only one line. I hung on to the line to the curb, about fifty feet. * * * The reason I dropped it was I could

> not hold on any longer; they were turning to the left and they would run over me and I had to let go of the lines; they hurt me as it was."

Further attempts by Crow to explain what happened will be found on pages 98-100, and 102-5.

He admitted, however, that he had testified on the trial of another action involving the same transaction that before the horses started to run he had got up on the step of the wagon for the purpose of untying the lines from the seat, and that on that occasion he had attempted in his testimony to justify his action in attempting to untie the reins before unhitching the tugs upon the ground that that was the only proper method of handling a team under such circumstances. (Transcript, pp. 99-100.) Also, there was testimony to the effect that about a week after the runaway Crow had stated to a police inspector of the City of Oakland that when he walked up to the team before they ran away he stepped up and got the lines from where they were attached to the seat, and that *then* the team started to run. (Transcript, pp. 107-8.) Furthermore, Thun testified that after the accident was over he went back to the brewery, and at that time heard Crow say to one of the other employees of the plaintiff in error that he had dropped one of the lines. (Transcript, pp. 109-110.) It is true that Cooper and McKinnon testified that they had not heard Crow make any such statement, but they testified at the same time that after the accident no one said anything at all about it,—a statement so obviously unbelievable as to discredit all the rest of their testimony. (Transcript, pp. 110-112.)

Upon the question whether the reins were properly fastened back, during the interval when the horses were standing in the driveway facing the open doorway leading out to Broadway, the evidence was conflicting. There was testimony to the effect that the reins were in fact fastened to the seat of the wagon, but at the same time the jury could justifiably infer from the testimony as a whole either that the reins although in some manner fastened to the seat had not been properly fastened or that if at first so fastened they had been negligently unfastened or loosened by Crow after Thun had started toward the office.

Aside from the testimony of Crow, which was confused and indefinite, the only testimony as to the fastening of the reins was that of McKinnon and Cooper. The former testified that after the accident he found one of the reins tied to a rod at the back of the seat, (Transcript, pp. 73, 77) but obviously not tied back sufficiently so that the wagon could not be drawn forward except by the reins. Cooper testified that on one or more of his visits to the bottling-house to get a drink after Crow had brought the team in he saw the reins tied back, (Transcript, pp. 80, 82-3, 84-9) but it was evident that he had had no opportunity for more than a casual observation.

Crow's testimony as to what he did with the lines was as follows (Transcript, p. 93):

> "There were no rings on the lines and there is a rail on the back of the seat; I just tied a loop right there with the lines, like you would tie a bow knot and put the lines through and pulled them through like this (illustrating); the brakes

were set, the lines were pulled back about the same as the rings would set them, pretty tight."

He was unable to explain how it was that if, as he testified, he had tied the reins in a single knot he could get one of them loose without untying the other. (Page 95.) All that he could suggest was that they were extraordinarily long reins, 2 or 3 feet longer than the reins to which he was accustomed; that there was no buckle on them, so that both ends were loose; and that the part which he caught must have been one of the loose ends hanging down from the seat. (Pp. 103-4, 105.)

We submit that the testimony in the case at bar presented precisely the kind of case to which the rule laid down in the decisions heretofore cited is peculiarly applicable; and that in view of all the circumstances it was essentially a question proper to submit to the jury, whether the cause of the injuries sustained by the defendant in error was or was not negligence on the part of Harry Crow.

A discussion of the underlying principle involved in any such case will be found in Beven on Negligence in Law (1908 edition), beginning at p. 115. To the cases there cited we would add *Strupp* v. *Edens,* 22 Wis. 432; and *Cincinnati etc. Ry. Co.* v. *South Fork Coal Co.,* 71 C. C. A. 316; 139 F. 528.

We desire to add that we do not claim at all that the plaintiff in error ought to be held liable upon the principle upon which the owner of a vicious animal

is held responsible for damage done by such animal. The authorities cited on pages 22 to 27 of the opening brief for plaintiff in error, (with the exception of *Garlick* v. *Dorsey,* 48 Ala. 220,) deal with a proposition not involved in this case.

As is expressly pointed out in *Finney* v. *Curtis,* 78 Cal. 498, 502, one of the cases relied upon by counsel for plaintiff in error, there are two separate and distinct grounds upon which the owner of an animal may be liable for damage done by such animal, one of the grounds being negligence in permitting a vicious animal to exercise his vicious propensities, (which kind of negligence is not shown to exist without evidence that the animal in question was in fact vicious and that the owner knew that fact,) and the other ground of liability being, as stated in *Finney* v. *Curtis,* that the animal "was so negligently handled by the owner as to cause the injury." (See also *Gary* v. *Arnold,* 175 Ill. App. 365.)

With regard to the testimony introduced in the case at bar to the effect that Crow was notified in the morning before he took the team out of the brewery that it was a free team, and a lively team, and the testimony of Crow himself as to what he had observed while driving the team during the day, what we claim is that the circumstances established by that testimony were circumstances which, as in the case of *O'Brien* v. *Miller,* 60 Conn. 214, 217, ought to have been notice to the driver that more than ordinary care was called for on his part to prevent the happening of a runaway.

We cite *Crawford* v. *Upper,* 16 Ontario Appeal Reports 440, (1889) as a case involving a claim for damages caused by a runaway horse, in which there was far less evidence as to what caused the horse to run, but in which nevertheless it was held error to order a nonsuit. See also *Whitney* v. *Ritz,* 151 N. W. 762.

Respectfully submitted,

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